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Review of application and implementation of the Set

Model Law on Competition (2015) – Revised chapter XI*

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Sanctions and relief

I. The imposition of sanctions, as appropriate, for:

(i) Violations of the law;

(ii) Failure to comply with decisions or orders of the Administering Authority, or of the appropriate judicial authority;

(iii) Failure to supply in formation or documents required within the time limits specified;

(iv) Furnishing any information, or making any statement, which the enterprise knows, or has any reason to believe, to be false or misleading in any material sense.

II. Sanctions could include:

(i) Fines (in proportion to the secrecy, gravity and clear-cut illegality of offences or in relation to the illicit gain achieved by the challenged activity);

(ii) Imprisonment (in cases of major violations involving flagrant and intentional breach of the law, or of an enforcement decree, by a natural person);

(iii) Interim orders or injunctions;

(iv) Permanent or long term orders to cease and desist or to remedy a violation by positive conduct, public disclosure or apology, etc.;

(v) Divestiture (in regard to completed mergers or acquisitions), or rescission (in regard to certain mergers, acquisitions or restrictive contracts);

(vi) Restitution to injured consumers;

(vii) Treatment of the administrative or judicial finding or illegality as prima facie evidence of liability in all damage actions by injured persons.

Commentaries on chapter XI and alternative approaches in existing legislation

Introduction[1]

1. Chapter XI of the Model Law on Competition deals with tools for competition law enforcement, namely sanctions and relief. The latter is more commonly referred to as remedies. Given the objective and the compulsory nature of competition laws, as well as commercial motivations for contravening them, sanctions and remedies are of particular importance. Safeguarding competition – the primary objective of most competition laws – requires companies to comply with compulsory provisions of a procedural or substantive nature. However, experience has shown that undertakings will comply with compulsory rules only if there is a high likelihood that non-compliance will be detected and, once detected, there is a high likelihood that sanctions will be imposed and that the direct and indirect cost of such sanctions will be commercially significant. As such, the threat of significant sanctions appears crucial for encouraging compliance with competition law. With respect to the primary objective of most competition laws, i.e. protecting the competitive process, remedies complement sanctions, since they aim at safeguarding or

[1] See TD/RBP/CONF.7/5.

restoring competition in cases where companies have distorted or are about to distort competition.

2. While the wording of chapter XI (II) may be understood to refer to sanctions only, it appears from the examples listed that this provision also covers remedies. For instance, the injunctions referred to in (II) (iii) and the orders to remedy a violation by positive conduct referred to in (II) (iv) are usually qualified as remedies. In addition, most competition laws provide for both of the two enforcement tools, which complement each other.

3. Sanctions and remedies are tools for public competition law enforcement, that is, for enforcement by public authorities, such as competition agencies and courts. Recently, well-established competition law regimes have begun to promote private enforcement through private actions by the victims of competition law violations, as a complement to public enforcement. This aspect of competition law enforcement does not fall under chapter XI, but is dealt with in the commentaries on chapter XIII.

I. The imposition of sanctions

Enforcement body vested with the power to impose sanctions

4. The power to impose sanctions may be vested either in the administering authority or in the judicial authority or may be divided between the two. In the latter case, for example, the administrative authority's power to impose a sanction might be limited to such conduct as refusals to supply information, the giving of false information or failure to modify agreements.

5. In India, Pakistan, Panama, Peru, the Russian Federation, Switzerland and the European Union, the administering bodies have powers to impose fines. In Australia, Thailand and the United States of America, the power to impose fines or other sanctions is vested in the courts.

Different types of sanctions

6. Sanctions may be imposed in the event of violation of a substantive provision of the competition law and of procedural violations, as noted in chapter XI (I) (iii) and (iv). For example, Austrian competition law provides for procedural sanctions in the event of false and/or misleading information in a merger notification and of false and/or misleading information or incomplete provision of information or non-compliance with a cartel court's order to provide information. Under Hungarian competition law, a procedural fine may be imposed on the party or other persons involved in the proceedings of a competition case and furthermore on persons obliged to provide assistance in clarifying the facts of the case if they engage in an act or display behaviour that is aimed at protracting the proceedings or preventing the disclosure of facts or which has such an effect.

7. Sanctions for contravention of substantive provisions may be of a civil, administrative or criminal nature. Administrative sanctions – in particular, fines – are the most common form of sanctions in cartel cases. Some legal systems provide for the possibility of imposing fines on individual competition law infringers in addition to those imposed on the undertaking on whose behalf they have acted. For example, in Germany, the competition law liability of an undertaking derives from the establishment of a competition law infringement by its management or employees. Other competition legislation only provides for the possibility of imposing fines on the companies in question. Besides fines, administrative sanctions may include prohibiting individuals from serving as

officers of public corporations and blacklisting companies involved in bid-rigging from future government tenders.

8. As opposed to administrative sanctions, which may be imposed by a competition authority, civil or criminal sanctions may only be decided upon by a court. Fines may have a civil, administrative or criminal nature, whereas imprisonment is exclusively criminal in nature. Some countries that opt for a system of administrative sanctions provide for criminal sanctions in specific competition cases, for example bid-rigging in government tenders organized by public authorities.

Alternative approaches in existing legislation

9. Alternative approaches in existing legislation to types of sanctions are detailed in table 1.

Table 1
Alternative approaches in existing legislation: Types of sanctions

	Sanctions						
	Civil		*Administrative*		*Criminal*		
Country or group	*Fines*	*Other*	*Fines*	*Other*	*Fines*	*Imprisonment*	*Other*
Armenia			X	X	Limited to severely anticompetitive behaviour		
Australia	X	X			X	X	
Brazil			X	X	X	X	
Canada			X	X	Limited to price fixing, market allocation and output restriction		
China			X	X			
Costa Rica			X	X			
Hungary			X	X			
Egypt		X	X	X	X		X
Ethiopia			X	X			
France			X	X	X	X	
Germany			X	X	Limited to bid-rigging		
India		X	X	X			
Indonesia			X	X	Law No. 5/1999 provides for several types of criminal sanctions, which are, however, not applied in practice		

Country or group	Sanctions						
	Civil		Administrative		Criminal		
	Fines	Other	Fines	Other	Fines	Imprisonment	Other
Japan			X	X	X	X	
Kenya			X	X	X	X	
Mexico		X	X	X	Limited to severely anticompetitive behaviour		
Peru			X	X			
Republic of Korea			X	X	X	X	
Russia Federation			X	X		Federal law No. 216-FZ, 29 July 2009, introducing amendments to article 178 of the Criminal Code	
South Africa			X	X	X	X	
Thailand		X			X	X	
Tunisia			X	X	X	X	X
Turkey			X	X			
United Kingdom of Great Britain and Northern Ireland			X	X	X	X	X
United States	X	X		X	X	X	
Zambia			X		X	X	
European Union			Limited to undertakings No personal liability				

10. Chapter XI (II) of the Model Law on Competition lists different types of possible sanctions. Although the list includes the most common types of sanctions, it should not be considered as exhaustive.

Fines (in proportion to the secrecy, gravity and clear-cut illegality of offences or in relation to the illicit gain achieved by the challenged activity)

11. As noted, fines may be civil, administrative or criminal in nature. For various reasons, including relatively low administration costs, they form a central element of every public enforcement system. In many jurisdictions, the competition law itself grants the power to the administering or judicial authority to impose fines and sets the maximum amount of fines by statutory limit. The maximum amount of fines should be set at a sufficiently high level to achieve a significant deterrent effect. It may be expressed as a percentage of the turnover of the competition law violator, in terms of a specific figure or in reference to a variable unit, such as a country's minimum salary.

Alternative approaches in existing legislation

12. Alternative approaches in existing legislation to the maximum amount of fines are detailed in table 2.

Table 2
Alternative approaches in existing legislation: Maximum amount of fines

Country or group	
Maximum amount of fines expressed as a percentage of the competition law violator's turnover	
Australia	With regard to civil pecuniary penalties, under the Competition and Consumer Act, 2010, a business that breaches a competition law provision may be ordered to pay a civil penalty. The maximum amount of the civil penalty is the greater of: $A 10 million; or three times the total value of the benefit obtained from the commission of the offence or the act or omission in contravention of the civil prohibition; or where those benefits cannot be fully determined, 10 per cent of the corporate group's annual turnover in a 12-month period preceding the offence or contravention. Individuals personally involved in a breach of the competition law provisions may have to pay a penalty of up to $A 500,000. With regard to criminal penalties, a business that breaches a criminal cartel provision may be ordered to pay a criminal fine. The maximum fine is the same as the maximum civil pecuniary penalty. Individuals found by a court to have been involved in a breach of a cartel offence provision may be subject to criminal charges and imposition of a fine up to 2,000 penalty units (currently $A 340,000) per criminal cartel offence and/or imprisonment for up to 10 years.
China	With regard to fines, article 48 of the Anti-monopoly Law provides that where business operators abuse their dominant market position in violation of this Law, the Anti-monopoly Law Enforcement Agency shall impose fines. The amount of the fines may be from 1 to 10 per cent of the sales revenue in the previous year. If a monopoly agreement has not been reached or the business operators implement a concentration in violation of this Law (article 48), the Anti-monopoly Law Enforcement Agency may impose a fine of less than RMB 500,000. The amount of fine (in article 46 through article 48) shall be determined through consideration of such factors as the nature, extent and duration of the violations.
Croatia	The Competition Act was adopted in June 2009 and entered into force on 1 October 2010. The Act states that fines of up to 10 per cent of the aggregate turnover of an undertaking in the financial year preceding the year when the

Country or group	
	infringement was committed may be imposed for the most serious breaches of the Act (engaging in any activity prohibited by or abstaining from doing what is required under the Act) and fines of up to 1 per cent may be imposed for other less severe violations of the provisions in competition law.
Ethiopia	Article 26 of Trade Practice Proclamation No. 329/2003 stated that the maximum fine for competition law violations amounted to 10 per cent of the value of the total assets of the violator or 15 per cent of its annual gross total sales. In 2014, Proclamation No. 823/2013 on trade competition and consumer protection was enacted. The new competition law provides different penalties for different offences. A fine shall only be calculated based on annual turnover. The range is from 5 to 10 per cent, except for an anticompetitive agreement or vertical agreement, where the fine shall be 10 per cent of the annual turnover. The range of fines for an individual involved in direct or indirect cooperation in any prohibited practice increased, from Br 5,000–50,000 to Br 10,000–100,000.
Hungary	According to the competition law, the proceeding competition council may impose a fine on persons violating the provisions of the law. The maximum fine shall not exceed 10 per cent of the net turnover achieved in the business year preceding that in which the decision establishing the violation of the undertaking is reached or, if the undertaking is a member of a group of undertakings that is identified in the decision, of that group of undertakings. The maximum fine imposed on social organizations of undertakings, public corporations, associations or other similar organizations shall not exceed 10 per cent of the total net turnover in the preceding business year of the undertakings that are members of the group.
India	The Competition Act provides for the imposition of large penalties in cases of contravention. The Competition Commission may impose a penalty of up to 10 per cent of the average turnover for the past three financial years in a case of abuse of dominance or for any agreement that is anticompetitive. With regard to cartels, the Commission may impose on each member a penalty of up to three times its profit for each year of the duration of the cartel.
Japan	According to the Anti-monopoly Act, surcharges are calculated based on the sales value of the products or services affected during the period of violations (maximum three years) by multiplying the respective sales value by percentage factors determined according to the type of violation, scale of operations and business categories. The percentage ranges between 1 and 20 per cent for manufacturing companies, 1 and 2 per cent for wholesalers and between 1 and 3 per cent for retailers.
European Union	Pursuant to Article 23, paragraph 2 of Regulation 1/2003, the European Commission may impose a maximum administrative fine against the infringing undertaking of 10 per cent of the undertaking's worldwide annual turnover in the preceding business year.
Maximum amount of fines expressed as a fixed sum	
Benin	According to Law No. 90-005, 15 May 1990, stipulating the conditions for commercial activities, fines of CFAF 500,000–10,000,000 may be imposed for violation of the law. The fines provided for by the draft competition legislation under discussion in 2010 were significantly higher.
Canada	Under the Competition Act, administrative penalties may not exceed Can$ 750,000 (and for each subsequent order Can$ 1 million) for an individual or Can$ 10 million (and for each subsequent order Can$ 15 million) for a corporation. With regard to criminal offences such as cartels,

Country or group	
	imprisonment for a term not exceeding 14 years or a fine not exceeding Can$ 25 million or both may be imposed.
Chile	The Competition Tribunal may impose fines of up to an amount equivalent to 20,000 annual tax units and, if sanctioning conduct prohibited under the Competition Act, an amount equivalent to 30,000 annual tax units, which is a legally defined currency for tax purposes and corresponds to the value of the monthly tax units in the last month of the commercial year multiplied by 12. The currency value is variable.
Thailand	Under the Trade Competition Act, 1999, all violations of anticompetitive offences shall be subject to imprisonment for a term not exceeding three years or a fine not exceeding B 6 million or both. In cases of repeated commission of an offence, a double penalty shall be applied.
United States	The Sherman Antitrust Act imposes criminal penalties of up to US$ 1 million for an individual and US$ 100 million for a corporation, along with up to 10 years' imprisonment. Under Federal law, the maximum fine may be increased to twice the amount the conspirators gained from the illegal acts or twice the money lost by the victims of the crime, if either of these amounts is over US$ 100 million.
Zambia	The Competition and Consumer Protection Act, 2010, imposes a general penalty on a person who contravenes a provision of the Act for which a specific penalty is not provided for under the Act, whereby the person is liable to a fine not exceeding 100,000 penalty units or imprisonment for a period not exceeding one year or both.
Maximum amount of fines expressed by reference to a variable unit	
Brazil	Law No. 12.529/2011 entered into force on 29 May 2012. This new competition law changed the range of fines to 0.1–20 per cent of the gross revenues of the company, economic group or conglomerate in the year prior to the start of the investigation and limited the basis for calculation of fines to the business segment in which the wrongdoing occurred. Under the new law, fines are no longer calculated based on the total gross revenues of a company but on the revenues of the business segment in which the conduct occurred. For individuals, the range of fines changed from, under the previous law, 10–50 per cent of the amount applied to the company to 1–20 per cent, under the new law.
Peru	The competition law distinguishes between different degrees of infringement. For the most serious infringements, the law provides for a fine ranging from 1,000 times the tax units (a reference unit based on the consumer price index) to 12 per cent of the annual turnover of the group of companies to which the violator belongs. The law prescribes fines based on the degree of seriousness of the infringement. For a less serious infringement, the Commission may impose a fine that ranges from 50 tax units (and does not exceed 10 per cent of the gross income received by the infringer) to a fine of 250 tax units (and does not exceed 10 per cent of the gross income obtained by the infringer). For more serious infringements, a fine of up to 700 tax units (and does not exceed 10 per cent of the gross income obtained by the infringer) may be imposed. If a cautionary measure is infringed, the Commission or court may impose a fine ranging from 10 to 125 tax units. In cases of continuing infringements, a fine of up to 700 tax units may be imposed. If corrective measures are not complied with, the Commission or court may impose a fine equal to 25 per cent of the previous fines. In cases of continuing infringements, a fine of up to the limit of 16 times the amount of the original coercive fine may be imposed.

13. In several jurisdictions, the administering authorities have published guidelines identifying the elements that are taken into account when calculating the amount of a fine. Aggravating factors, such as continuation or repetition of an infringement or an important role in its realization may lead to an increase in the fine. In this context, a high amount of illicit profit may constitute an aggravating factor. By contrast, mitigating circumstances result in a reduction of the fine. Most importantly, in several countries, cooperation by a competition law violator within the framework of a leniency programme justifies a reduction of the fine. For example, in Hungary, the Competition Council grants immunity from or reduces the fine imposed on undertakings that disclose to the Competition Authority, in a manner specified by the Act on the Prohibition of Unfair Trading Practices and Unfair Competition, agreements or concerted practices between competitors that are aimed directly or indirectly at fixing purchase or selling prices, at sharing markets, including bid-rigging, or at the allocation of production or sales quotas (Act No. LVII, 1996, articles 78/A–78/B and 88/D). On 1 April 2010, an amendment entered into force that institutionalized the informant reward scheme. Based on the amendment, persons who provide indispensable information about hard core cartels may be entitled to a reward under conditions specified by law, which must not exceed 1 per cent of the fine). In addition, a competition authority may reward a company's willingness to agree on settlement of a cartel case with a reduction in the fine, since such settlements help shorten the prosecution period and save resources. Further mitigating factors may include immediate termination of an infringement subsequent to the intervention of the competition authority and negligent violation of competition law as opposed to intentional wrongdoing. In exceptional cases, a competition authority may also take into account an undertaking's inability to pay in a specific social and economic context and may therefore reduce the fine or allow for moderated payment modalities. Fining a company to the level of bankruptcy and thereby causing a market exit would be against the primary objective of competition laws of protecting the competitive process.

Imprisonment (in cases of major violations involving flagrant and intentional breach of the law, or of an enforcement decree, by a natural person)

14. Recent enforcement attitudes in well-established competition law regimes towards anticompetitive agreements have involved seeking deterrence by means of very substantial fines for companies. For example, in 2008, the European Commission fined Saint-Gobain, of France, EUR 896 million for its involvement in a market-sharing cartel with other glass manufacturers. In 2009, the chip manufacturer Intel was found to have infringed article 102 of the Treaty on the Functioning of the European Union and, consequently, a fine of over €1 billion was imposed. In addition, a trend towards higher fines may also be observed in some younger competition law regimes. For example, the Competition Commission of India imposed a cumulative penalty of more than US$ 1 billion on cement manufacturing companies and the trade association of cement manufacturers (Builders Association of India versus Cement Manufacturers' Association and Others, Case No. 29/2010).

15. Although most competition legislation provides for civil or administrative sanctions in the case of anticompetitive behaviour, there is a trend towards criminalization. Until recently, only the United States imposed criminal sanctions involving imprisonment on individuals in cases of competition law violation. The Sherman Antitrust Act provides for criminal penalties (for violations of sections 1 and 2) and an infraction may be prosecuted as a felony punishable by a corporate fine and up to 10 years' imprisonment for individuals. A number of other countries had provisions in place without applying them. Currently, more countries, including Canada, Israel, Japan and the United Kingdom, are imposing criminal sanctions on individuals, to fight hard core cartels. The United Kingdom has

introduced, under Enterprise Act, 2002, criminal sanctions for individuals who commit certain clearly defined anticompetitive offences. In 1999, Thailand imposed an imprisonment sanction of up to three years for all anticompetitive offences, and the sanction is doubled in cases of repetition. In 2008, jail terms were imposed for the first time by courts of the United Kingdom on individuals who had participated in an international cartel. In 2009, the Parliament of Australia passed legislation (Trade Practices Amendment (Cartel Conduct and Other Measures) Act) to criminalize specific cartel conduct, including price-fixing, restricting outputs in the production or supply chain, allocating customers, suppliers or territories and bid-rigging.

16. Proponents of criminal sanctions for individuals argue that these are the most effective motivations for compliance by corporate managers and therefore corporations. Since the current level of fines imposed on companies in jurisdictions such as the United States and the European Union could not be raised further without causing economic damage, and since fines would ultimately be passed on to consumers, greater deterrence by other means would be needed. Therefore, personal liability on the part of wrongdoers would have to play a more important role. In this context, it is also argued that pecuniary sanctions imposed on individuals would not result in the desired deterrence, since there is a high risk that companies would assume the respective fines on behalf of their employees. This risk may be mitigated by a respective prohibition addressed to the company.

17. However, for a number of reasons, a State may opt against criminal sanctions for competition law violations. First, it may not be appropriate to provide for criminal sanctions when competition law is new and the business community has not had a reasonable period to familiarize itself with the new legal obligations. Second, until competition law principles are widely accepted as an important part of the legal and economic environment, the criminalization of violations may not be in line with social and legal norms. Third, the costs of criminal sanctions – in particular, imprisonment – may appear too high in comparison with the costs of other forms of sanctions. Another concern put forward against criminal sanctions in competition cases relates to increased procedural requirements, for example a higher standard of proof to be respected in criminal cases. These factors may make the prosecution of competition law violations more difficult and costly and decrease the number of successful cases. Each of these arguments may have some validity.

18. The power to impose imprisonment is normally vested in the judicial authority. In certain countries, such as Japan and Norway, the power to impose terms of imprisonment is reserved for the judicial authorities on the application of the administering authority.

Remedies

19. In contrast to sanctions, remedies that aim at maintaining or restoring competition in the future are not punitive in nature. Remedies serve to put a competition law infringement to an end, compensate victims and cure the competitive harm. Remedies are conventionally classified as either structural or behavioural. Structural remedies are generally one-off remedies that intend to restore the competitive structure of the market. Behavioural remedies are normally ongoing or time-limited remedies designed to modify or constrain the behaviour of firms (in some jurisdictions, behavioural remedies are referred to as conduct remedies). If such remedies require any ongoing supervision or monitoring, the cost for both the authority and undertakings may be high. Some remedies, such as those relating to access to intellectual property rights, are particularl difficult to categorize on this basis.

20. Depending on the legal framework, competition authorities may impose remedies unilaterally, or may negotiate them with the parties concerned upon a proposal made by the parties (undertakings or commitments). Undertakings or commitments are sometimes considered as sanctions. However, taking into account that they primarily seek to reinstate competition where it has been distorted by an anticompetitive practice, undertakings or commitments may be classified as remedies.

21. In addition to fines and imprisonment, Chapter XI (II) of the Model Law on Competition lists a number of measures that actually qualify as remedies, according to the current understanding of most competition laws.

Interim orders or injunctions

22. Interim orders or injunctions generally fall under the category of behavioural remedies. They may be granted as a preliminary measure during a pending competition case in order to prevent a company from violating or continuing to violate the competition law. In different competition law regimes, different enforcement bodies are vested with the power to impose interim orders or injunctions. In countries with common law systems, it is mainly the courts who exercise this power. For example, in Canada, the Director of Public Prosecutions may, in urgent situations, apply for an interim injunction to the competent court to temporarily halt behaviour that constitutes or is directed toward the commission of an offence. In civil law countries, competition authorities may have such powers. For example, in Germany, the Federal Cartel Office may pronounce interim measures according to section 32a of the Act Against Restraints of Competition. In Hungary, the Competition Council may, as an interim measure, prohibit in its injunction the continuation of the illegal conduct or order the elimination of the unlawful situation, if prompt action is required for the protection of the legal or economic interests of the interested persons or because the formation, development or continuation of economic competition is threatened. According to the Act on the Prohibition of Unfair Trading Practices and Unfair Competition, the Competition Council may also require a bond as a condition, if the interim measure was required by the party under investigation (articles 72 (1) (c) and 72 (2)). Although India has a common law system, the Competition Commission is empowered to issue interim orders upon being satisfied that a contravention has been committed and continues to be committed or there is a likelihood of the same, and the Commission may grant temporarily restraint orders. Such orders may be effective until the conclusion of the inquiry or until further orders, even without giving notice to such party, where it deems it necessary.

Permanent or long-term orders0 to cease and desist or to remedy a violation by positive conduct, public disclosure or apology, etc.

23. In effect, cease and desist orders are similar to injunctions and serve as a means to bring a competition law infringement immediately to an end. For instance, a competition authority may order cartellists to stop price-fixing agreements or may order a dominant undertaking to stop the anticompetitive bundling of certain products. Most competition legislation provides for cease and desist orders.

24. In certain situations, however, the conduct under scrutiny has already caused anticompetitive harm, and it may be necessary to order specific measures in order to restore competition. In this context, chapter XI (II) (iv) of the Model Law on Competition refers to orders to remedy a violation by positive conduct, public disclosure or apology, etc. The imposition of a behavioural remedy compels the undertaking to act in a particular way.

This includes, for example, rebate systems, amendments to price structures, changes to trading conditions and granting of access to infrastructure or intellectual property.

25. Although behavioural remedies may be formulated to address a specific competitive concern, they are often considered inconvenient from the perspective of monitoring, given that they require ongoing monitoring, which affects a competition authority's resources.

Divestiture (in regard to completed mergers or acquisitions), or rescission (in regard to certain mergers, acquisitions or restrictive contracts)

26. Divestiture in merger cases is the most frequent structural remedy. Under a pre-merger notification system, competition authorities typically assess the likely effects of a notified transaction on competition. If this prognosis reveals competitive concerns, they may be addressed through appropriate remedies, such as divestiture of specific parts of an undertaking, for example a production site or distribution network. Competition legislation varies on the question of whether divestitures must be proposed by the notifying parties and then tested by the competition authority or whether the authority is granted the power to unilaterally impose a divestiture in its clearance decision. Taking into account the fact that the parties to a proposed merger are primarily responsible for shaping the transaction, it may be advisable for competition authorities to rely upon the parties to design an appropriate remedy in dialogue with the competition authority.

27. In Japan, for example, in many cases, parties voluntarily hold prior consultations with the Fair Trade Commission in advance of formal notifications. The Commission carries out inspections at an early stage, and if it concludes that the transaction is problematic, indicates its competition concerns to the parties, without reaching any final clearance decision. The parties then propose a remedial measure on a voluntary basis, the effectiveness of which is assessed by the Commission.

28. Under post-merger notification systems, a competition authority only intervenes once the transaction in question has already been completed. Thus, any remedy to competitive concerns may only be designed and decided upon after implementation of the merger, which may pose certain inconveniences from a practical perspective. In a situation where a divestiture may not remedy the competitive harm caused by a merger, the competition authority may have to order the rescission or dissolution of the merger, which involves the difficulty of "unscrambling the eggs".

29. In merger cases, rescission constitutes an ultima ratio if competition cannot be safeguarded by any other means. Typically, it may be applied if the parties to an anticompetitive merger have not respected a statutory waiting period in a pre-merger notification system and have implemented the proposed transaction without the required approval by the competent authority. As noted, rescission may also occur under post-merger notification systems.

Alternative approaches in existing legislation

30. Alternative approaches in existing legislation to structural remedies in merger cases are detailed in table 3.

Table 3

Alternative approaches in existing legislation: Structural remedies in merger cases

Country or group	*Structural remedies in merger cases*
Canada	If the Competition Bureau believes that a merger is likely to prevent or lessen competition substantially, the Commissioner may either apply to the Competition Tribunal to challenge the merger under the applicable provisions of the Competition Act or negotiate remedies with the merging parties in order to resolve competition concerns on consent (section 105). If the Tribunal finds that a merger prevents or lessens or is likely to prevent or lessen competition substantially, it may issue an order prohibiting the merger or a remedial order requiring the parties to dissolve the merger or make divestitures. Failure to file a merger pre-notification (without good and sufficient cause) when one is required is a criminal offence, punishable by a fine of up to Can$ 50,000. Parties to a proposed transaction that exceeds certain monetary thresholds must notify the Commissioner and wait for a statutory review period to expire before the transaction may close. Non-compliance with the waiting period rules may lead to an order requiring the parties to dissolve the merger, make divestitures or pay an administrative monetary penalty of up to Can$ 10,000 for each day of non-compliance. Further, the Tribunal may grant an interim order preventing the parties from closing the merger upon their failure to file a merger pre-notification.
Mauritius	In assessing the competitive effects of a merger, the Competition Commission considers the foreseeable future. For most industries, this may involve a period of two to five years. If any anticompetitive effects are expected to last less than two years, the Commission normally allows the merger to proceed, although if the effects are significant, it may lead to a significant lessening of the competition finding and the Commission may impose temporary remedies. In some cases, such as industries involving long lead times and long-term contracts, the foreseeable future might be longer than five years. Proposed mergers notified to the Commission may be blocked if they are expected to result in a significant lessening of competition and if there is no more effective remedy. If a significant lessening of competition is expected only in some markets, then the Commission may block only part of the deal, allowing the merger to be completed subject to certain parts of the target enterprise remaining independent. Alternatively, the merger may be allowed to be completed in full, but the merged enterprise would then be required to sell off part of the enterprise within a specified period. In both cases, the Commission applies the same principles to determining the package of assets that must be removed from the merged enterprise as set out below. In selecting a remedy or package of remedies, the Commission considers the effectiveness, timeliness and proportionality of implementation costs to expected benefits of the remedy. Remedies applied by competition authorities are often divided into structural remedies such as divestment, which aim to restore or enhance competition by changing the market structure, and behavioural remedies, which aim to change the behaviour of enterprises through orders or contractual undertakings. Generally, structural remedies require little if any monitoring once the structural change has taken place, while behavioural remedies normally require the Commission or a nominated agent to monitor compliance. The Commission may also make non-binding recommendations to the Government. The divestment of assets may represent a highly effective means to create a more competitive market structure than would otherwise exist. However, the Commission recognizes that forced divestment represents a considerable intervention in property rights. It therefore does not require divestment in

Country or group	*Structural remedies in merger cases*
	such cases unless it is satisfied that no other equally effective remedy exists and that such intervention is not disproportionate to the expected benefits. The package of assets must be viable, whether in independent ownership or under the control of an existing actor in the market. Viability requires that the divested business be able to offer an effective competitive threat to other producers in the market, while remaining profitable. The Commission allows enterprises as much freedom as possible in choosing the manner of divesting their assets, as long as the effectiveness of the remedy is preserved and the divestment proceeds in a timely fashion. The Commission may also place restrictions on the types or specific identities of allowed buyers of the divested assets. Before proceeding to due diligence, enterprises divesting assets must obtain the Commission's approval of the preferred buyer. The Commission is likely to reject potential buyers if it believes they will not use the assets to compete effectively in the relevant markets in which it has identified concerns. Divestment remedies normally require no monitoring or enforcement by the Commission once the sale of assets is complete. However, as part of the divestiture order or accepted undertakings, the Commission normally specifies that the divested assets cannot be repurchased by the divesting enterprise or otherwise come back under its control. This prohibition is limited by a sunset clause, typically of 10 years.
United States	Divestiture constitutes a remedy in cases of unlawful mergers and acquisitions. It is considered a structural remedy, requiring some dismantling or sale of the corporate structure or property that contributed to the continuing restraint of trade, monopolization or acquisition. Structural relief may be subdivided into the three categories of dissolution, divestiture and divorcement. Dissolution generally refers to a situation where the dissolving of an allegedly illegal combination or association is involved and may include the use of divestiture and divorcement as methods of achieving that end. Divestiture refers to situations where the defendants are required to divest themselves of property, securities or other assets. Divorcement is commonly used to indicate the effect of a decision where certain types of divestiture are ordered and is especially applicable in cases where the purpose of the proceeding is to secure relief against antitrust abuses flowing from integrated ownership or control, such as vertical integration of manufacturing and distribution functions or the integration of the production and sale of diversified products unrelated in use or function. This type of remedy is not created in express terms of statute. The remedies may include negotiating agreements by the enforcing agencies to address the competition concerns while permitting the transaction to be consummated. The usual course involves the divesture of overlapping assets, imposition of restrictions or affirmative obligations or the licensing of intellectual property rights. However, section 4 of the Sherman Antitrust Act and section 5 of the Clayton Antitrust Act empower the Attorney-General to institute proceedings in equity to "prevent and restrain" violations of the antitrust laws and state that "such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined otherwise prohibited". Furthermore, aside from these general statutory authorizations, the essence of equity jurisdiction is the power of the court to change the decree to the necessities of the particular case. Thus, invocation by the Government of the general authority of a court of equity under the Sherman Antitrust Act or Clayton Antitrust Act enables the court to exercise wide discretion in framing its decree so as to give effective and adequate relief (see C Oppenheim, GE Weston and JT McCarthy, 1981, *Federal*

Country or group	*Structural remedies in merger cases*
	Antitrust Laws: Cases, Text and Commentary (Saint Paul, Minnesota, West Publishing Company) and Bureau of Competition of the Federal Trade Commission, 1999, A study of the commission's divesture process, available at https://www.ftc.gov/sites/default/files/attachments/merger-review/divestiture.pdf (accessed 18 May 2015)).
European Union	European Council Regulation No. 139/2004 on the control of concentrations between undertakings provides the legal basis for merger control in the European Union. The regulation prohibits mergers and acquisitions that would significantly reduce competition in the single market, for example if they created dominant companies that were likely to raise prices for consumers. With regard to mergers, the Regulation expressly provides that the European Commission may decide to declare a concentration compatible with the European Union market. During the first or second phase of an investigation, if there are competition concerns, the merging companies may offer remedies that guarantee continued competition on the market. However, the European Commission is not in a position to unilaterally impose any conditions on an authorization decision. The European Commission only analyses whether the proposed remedies are viable and sufficient to eliminate competition concerns. It also takes into account the views of market participants in a market test. If remedies are accepted, they become binding upon the companies. An independent trustee is then appointed to oversee compliance with these commitments. After the investigation, the European Commission may either unconditionally clear the merger or approve the merger subject to remedies or prohibit the merger if no adequate remedies to the competition concerns have been proposed by the merging parties.

Restitution to injured consumers

31. Some competition legislation allows the competent authority to order restitution to those who suffered harm resulting from the anticompetitive conduct. For example, in Indonesia, administrative measures provided for in article 47 of the law concerning the Ban on Monopolistic Practices and Unfair Business Competition (No. 5/1999) include the stipulation of a compensation payment by the competition authority. Such a restitution order, as part of public enforcement, is different from damages, which may be accorded by a civil court as part of private competition law enforcement. The latter is referred to in chapter XIII of the Model Law on Competition.

Treatment of the administrative or judicial finding or illegality as prima facie evidence of liability in all damage actions by injured persons

32. As noted, well-established competition law systems have begun promoting private enforcement of competition law, that is, private actions for damages by those who have suffered harm resulting from anticompetitive conduct, in particular by hard core cartels. Such private actions are generally initiated in civil courts and predominantly take the form of follow-on actions, i.e. actions that follow public prosecution in a cartel case.

33. For the purposes of procedural efficiency, competition legislation may stipulate that the findings of a competition authority or court that established anticompetitive behaviour

should be binding for follow-on claims for damages. This means that claimants for damages do not need to prove again the anticompetitive behaviour by the defendant while claiming damages before the court and that claimants need only substantiate and prove the damage they suffered from the infringement of the competition law. For example, in Germany, according to the Act Against Restraints of Competition, if damages are claimed for a competition law violation, the court shall be bound by a finding of such a violation in a final decision of any national cartel authority of a member State of the European Union or of the European Commission. In some countries, private action for damages is only allowed subsequent to a competition authority's decision, for example in Costa Rica, Japan and South Africa.

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Review of application and implementation of the Set

Model Law on Competition (2015) – Revised Chapter XIII[1]

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Actions for damages

To afford a person, or the State on behalf of the person who, or an enterprise which, suffers loss or damages by an act or omission of any enterprise or individual in contravention of the provisions of the law, to be entitled to recover the amount of the loss or damage (including costs and interest) by legal action before the appropriate judicial authorities.

Commentaries on chapter XIII and alternative approaches in existing legislation

Introduction

1. In several countries, competition laws are not only publicly enforced via sanctions imposed by the administering or judicial authority, but also via private actions for damages by individuals or enterprises that have suffered losses from anticompetitive behaviour (private enforcement). The proposed Model Law on Competition provision would give the right to an individual and/or enterprise or the State on their behalf to bring a suit in respect of breaches of law, in order to recover damages suffered, including costs and interest accrued. Such civil action would normally be conducted through the appropriate judicial authority, unless a State specifically empowers the administering authority in this regard.

Efforts to promote private enforcement in well-established competition law regimes

2. The European Union has adopted a directive on rules governing actions for damages under national law for infringements of competition rules. Member States of the European Union have two years to implement this directive in their national legal systems. The directive specifies important substantive and procedural issues such as subject-matter, disclosure of evidence, limitation period and mode of liability. Anyone (e.g. a direct or indirect purchaser or supplier, including consumers) that has suffered harm due to a competition law infringement (articles 101 and 102 of the Treaty on the Functioning of the European Union or national competition law predominantly pursuing the same objective) by an undertaking or an association of undertakings may claim full compensation.

3. Compensation covers actual loss and loss of profits, plus payment of interest. Any participant in a cartel is responsible to the victims for the whole harm caused by the cartel and may pay compensation along with the other infringers. Importantly, this does not apply to small or medium-sized enterprises or to companies that have been granted immunity for bringing the infringement to the attention of the competition authority. These companies only need to compensate purchasers of their own products, unless other infringers are unable to provide full compensation to victims.

4. In order to facilitate follow-on damages actions in antitrust litigations, the Government of the United Kingdom of Great Britain and Northern Ireland has proposed a bill on consumer rights for the consideration of Parliament. The bill provides significant changes, including an extension of the jurisdiction of the Competition Appeal Tribunal, establishment of opt-in collective actions and introduction of voluntary redress schemes.

Forms of private actions for damages

5. Competition law regimes vary with respect to the forms of private actions for damages. Firstly, individual actions need to be distinguished from class actions. In the former, each person and/or company that alleges harm must pursue its own independent

action. That is, only the person who has suffered harm from anticompetitive conduct has standing to file a claim for damages. Following legislation reforms, Germany and Japan now allow greater participation by qualified organizations in filing actions for damages caused by the infringement of competition law. In a class action, a single action may be initiated on behalf of many persons and/or companies alleging harm from the same contravention.

6. Depending on the procedural provisions of a country, persons who are entitled to commence a single action may also transfer their claims to another person, who then has standing to file the claim. Individual actions may be limited to follow-on actions. That is, plaintiffs must wait until a final decision states the anticompetitive conduct before filing a claim for damages resulting from such conduct. This limitation is based on considerations of procedural efficiency and, in a jurisdiction where the competition authority is responsible for prosecuting and sanctioning anticompetitive behaviour, ensures that the civil courts do not assess the conduct in question differently from the way it is assessed by the competition authority. In addition, plaintiffs often prefer follow-on actions, as they need not pay the costs of proving the competition law infringement.

7. Through representative or class actions, a group of plaintiffs collectively brings a claim for damages to court. The rationale for allowing such collective actions in competition matters is twofold. First, each individual claim may be too small to justify separate action and a possibly lengthy court procedure. Second, the class action may significantly reduce the costs of the action for each plaintiff. A class action may be brought on behalf of a class of persons whose identity need not be ascertained when submitting the claim, but the membership of the class must be ascertainable. For example, a class may consist of direct purchasers of cartelized products, while indirect purchasers and end-consumers may form further classes.

8. In most jurisdictions, damages to be obtained by the plaintiff are limited to full compensation of the loss suffered from the anticompetitive conduct, including the costs of the legal proceedings and interest. However, in the United States of America, a plaintiff may benefit from punitive damages, which may amount to triple the actual damage.

Alternative approaches in existing legislation

9. Alternative approaches in existing legislation regarding private actions for damages are detailed in the table.

Country, group or region	
	Individual actions only
China	According to Article 50 of the Anti-monopoly Law, business operators that carry out monopolistic conducts and cause damages to others shall bear civil liability according to law. The provisions of the Supreme People's Court Regulation on Several Issues Concerning the Application of Law in the Trial of Civil Cases Arising from Monopolistic Conducts (Anti-monopoly Judicial Interpretation), as adopted at the 1539th Session of the Judicial Committee of the Supreme People's Court and issued on 3 May 2012, specify the subject-matter and scope of coverage, jurisdiction, standing to sue, burden of proof, liability, statute of limitations, etc. Article 1 of the Anti-monopoly Judicial Interpretation indicates that the scope of coverage is monopolistic conduct, including monopoly agreements, abuse of dominant market position and the concentration of

Country, group or region	
	undertakings. However, abuse of administrative power to eliminate or restrict competition is excluded, since the nature of such litigation is administrative proceedings and abuse of administrative power to eliminate or restrict competition is not monopolistic conduct listed in article 3 of the Anti-monopoly Law. Regarding standing to sue, article 1 stipulates that natural persons, legal persons and other organizations may file civil lawsuits with the people's courts for disputes over losses caused by monopolistic conduct or violations of the Anti-monopoly Law by contractual provisions, bylaws of industry associations, etc. In light of Article 108 of the Civil Procedure Law, plaintiffs shall have a direct interest in the case. An important test of direct interest is whether immediate losses are caused by monopolistic conduct. Article 7 provides that in a case of alleged monopolistic agreement as described in article 13.1 of the Anti-monopoly Law, the defendant shall assume the burden to prove that the agreement does not have the effect of eliminating or restricting competition. Article 8 provides that in a case of abuse of a dominant market position as described in article 17.1 of the Anti-monopoly Law, the defendant shall assume the burden to prove a justification of its conduct. Article 14 provides that where a defendant's monopolistic conduct has caused any losses to the plaintiff, the people's court may, in light of the plaintiff's claims and the finding of facts, order the defendant to cease infringement and compensate for losses. In addition, according to the plaintiff's claim, the people's court may include the plaintiff's reasonable expenses on investigation and prevention of the monopolistic conduct in the scope of compensation for losses.
South Africa	Section 65 of Competition Act No. 89, 1998 (as amended) states: (6) A person who has suffered loss or damage as a result of a prohibited practice: (a) may not commence an action in a civil court for the assessment of the amount or awarding of damages if that person has been awarded damages in a consent order confirmed in terms of section 49 D (1); or (b) if entitled to commence an action referred to in paragraph (a), when instituting proceedings, must file with the Registrar or Clerk of the Court a notice from the Chairperson of the Competition Tribunal, or the Judge President of the Competition Appeal Court, in the prescribed form: (i) certifying that the conduct constituting the basis for the action has been found to be a prohibited practice in terms of this Act; (ii) stating the date of the Tribunal or Competition Appeal Court finding; and (iii) setting out the section of this Act in terms of which the Tribunal or the Competition Appeal Court made its finding. (7) A certificate referred to in subsection (6) (b) is conclusive proof of its contents, and is binding on a civil court. (8) An appeal or application for review against an order made by the Competition Tribunal in terms of section 58 suspends any right to commence an action in a civil court with respect to the same matter. (9) A person's right to bring a claim for damages arising out of a prohibited practice comes into existence: (a) on the date that the Competition Tribunal made a determination in respect of a

Country, group or region	
	matter that affects that person; or (b) in the case of an appeal, on the date that the appeal process in respect of that matter is concluded. (10) For the purposes of section 2A (2) (a) of the Prescribed Rate of Interest Act, 1975 (Act No. 55 of 1975), interest on a debt in relation to a claim for damages in terms of this Act will commence on the date of issue of the certificate referred to in subsection (6). Though the Competition Act does not make any specific provision for class actions, in 2013, the Constitutional Court handed down a judgement overturning the judgements of both the High Court and the Supreme Court of Appeal, which effectively refused to allow the applicant harmed by a bread cartel to bring a class action. This case has the potential to set a precedent for class actions.
Tunisia	Civil law complements competition law by allowing victims of anticompetitive conduct to file an action for damages with the civil courts.
United Kingdom	Companies or individuals who have suffered loss as a result of a breach of competition law may bring an action for damages against the party or parties engaged in the anticompetitive behaviour. Damages actions may either be stand-alone or follow-on from a decision of a regulator. Actions can be brought before either the High Court or the Competition Appeal Tribunal. The Government has brought forward legislation to reform civil litigation procedures to facilitate follow-on damages actions in competition cases by addressing the difficulties faced by claimants. A bill on consumer rights being considered by Parliament is presently at the report stage in the House of Commons, prior to receiving its third reading and being passed to the House of Lords.
European Union	Articles 1 and 3 stipulate the subject-matter and scope of the directive on certain rules governing actions for damages under national law for infringements of the competition law provisions of the member States and of the European Union (2014/104/EU, 24 October 2014). Any natural and legal person who has suffered harm caused by an infringement of competition law should be able to claim and obtain full compensation for that harm, which shall not lead to overcompensation. Full compensation shall cover actual loss and loss of profit, plus the payment of interest. Articles 5, 6, 7 and 8 set out the rules of disclosure of evidence. Member States shall ensure that national courts are able to order the defendant or a third party to disclose relevant evidence upon request of a claimant who has presented a reasoned justification containing reasonably available facts and evidence sufficient to support the plausibility of the claim for damages. However, there are several conditions and limitations concerning the disclosure of evidence, as follows: evidence has to be specified either by item or category and national courts may only grant requests that are proportionate; national courts cannot at any time order a party or a third party to disclose evidence of leniency statements and settlement submissions; and national courts may order the disclosure of evidence prepared specifically for the proceedings of a competition authority only after the competition authority has closed its proceedings. Article 9 states the effect of national decisions. The final decisions of the domestic competition authorities or review courts of member States shall be deemed as irrefutable evidence that an infringement has been committed. Final decisions from other member States will qualify as at least prima facie

Country, group or region	
	evidence that an infringement of competition law has occurred. Article 10 stipulates that member States shall ensure that the limitation period for bringing actions for damages is at least five years. The limitation period cannot begin to run before the infringement has ceased and the claimant knows or can reasonably be expected to know the behaviour, the fact that it constitutes an infringement, the fact that this caused the claimant harm and the identity of the infringer. Article 11 provides that the mode of liability is joint and several liability. However, the directive sets two derogations, as follows: a small or medium-sized enterprise is liable only to its own purchasers where its market share in the relevant market was below 5 per cent and the normal joint and several liability would jeopardize its economic viability; and immunity recipients are liable only to their direct and indirect purchasers. Moreover, the amount of contribution of an immunity recipient may not exceed the amount of harm it caused to its own direct or indirect purchasers or providers, with immunity recipients liable for damages to other injured parties only where full compensation cannot be obtained from the other infringing parties.
Latin America	Limitations on private cartel enforcement in range from the lack of private rights of action to administrative, procedural, evidentiary and cultural challenges. Three areas that need work are claim aggregation, access to information and judicial or administrative competence.
	Possible class actions
Japan	Article 25 of the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (No. 54, 14 April 1947) states: 1. Any entrepreneur that has committed an act in violation of the provisions of articles 3, 6 or 19 (in the case of entrepreneurs who have committed acts in violation of the provisions of article 6, limited to those entrepreneurs who have effected unreasonable restraint of trade or employed unfair trade practices in the international agreement or contract concerned) and any trade association that has committed an act in violation of the provisions of paragraph 1 of article 8 shall be liable for damages suffered by another party. 2. No entrepreneur or trade association may be exempted from the liability prescribed in the preceding paragraph by proving the non-existence of intention or negligence on its part. Article 26 states: 1. The right to claim for damages pursuant to the provisions of the preceding article may not be alleged in court until the cease and desist order prescribed in the provisions of paragraph 1 of article 49 (in the case that no such order is issued, the payment order prescribed in paragraph 1 of article 50 (excluding those issued against an entrepreneur that constitutes a trade association that has committed an act in violation of the provisions of item 1 or 2 of article 8)) or the decision set forth in the provisions of paragraph 4 of article 66 has become final and binding. 2. The right set forth in the preceding paragraph shall become extinct by prescription after a lapse of three years from the date on which the cease and desist order or the payment

Country, group or region	
	order or the decision set forth in the said paragraph became final and binding.
	The Act on Special Provisions of Civil Court Procedures for Collective Recovery of Property Damage of Consumers (No. 96, 2013). The Act was promulgated on 11 December 2013 and will take effect within three years from the date of promulgation. The Act covers class actions for damages resulting from a tort committed in conjunction with the conclusion or performance of a consumer contract. The Act enables a special qualified consumer organization to file claims on behalf of consumers for damages arising out of consumer contracts in cases of fraudulent contracts and coerced consumer contracts. It is therefore possible that this new procedure will apply in instances where the imposition of contractual terms on a consumer also constitutes a violation of the anti-monopoly law.
	Individual actions and class actions
Australia	The Competition and Consumer Act provides that a person who suffers loss or damage as a result of cartel conduct can recover the amount of the loss or damage in a private action. Private litigants may also obtain declarations, injunctions and ancillary orders. The Australian Competition and Consumer Commission also has the power to commence representative proceedings on behalf of a group that has suffered loss or damage as a result of cartel conduct. The Federal Court of Australia Act provides a class action regime for private litigants to claim damages resulting from contraventions of the anticompetitive conduct provision of the Competition and Consumer Act. Once a class has been described, every person in that class is assumed to be part of the class unless they decide to opt out of the action by filing a notice with the court in a specified form. Under section 87 (1B) of the Competition and Consumer Act, the Commission has the power to seek damages on behalf of third parties who have suffered damages resulting from contraventions of the anticompetitive conduct provisions of the Act. The parties must opt in by giving their consent to the proceedings on their behalf.
Brazil	The right to bring a civil action to recover damages resulting from a breach of competition law is guaranteed under article 47 of the antitrust law, which states that the injured parties shall be entitled to file action in order to, in the protection of their individual or homogeneous individual interests, obtain the cessation of practices which constitute infringement of the economic order, as well as the receipt of indemnification for the damages sustained, regardless of the inquiry or administrative proceeding, which shall not be stayed by virtue of the filing of the lawsuit. A prior finding by the competition authorities that an infringement has occurred is not required to bring a claim (and such findings do not in any case bind the courts). Private enforcement action is independent of public enforcement and claims may be brought even where no investigation into the conduct in question has been initiated. The Public Prosecutor's Office (Federal and state) may file a public class action on behalf of an injured class to obtain compensation for any infringement of competition law, based on the public class action law. The same type of lawsuit may be brought by duly organized associations on behalf of their members. Any association bringing a claim in the general public interest must be at least one year old and have in its institutional objectives the protection of the environment, the consumer, economic order, free competition or touristic, aesthetic, historical and landscape heritage.

Country, group or region	
	If the Public Prosecutor or an association brings a class action, then the injured parties themselves will not be directly involved in the conduct of the litigation. However, if a party that suffered damage brings its own separate claim for compensation, these actions will be consolidated and addressed as part of the same proceedings.
Germany	According to Section 33 (1) of the Act against Restraints of Competition, whoever violates a provision of the Act, article 101 or article 102 of the Treaty on the Functioning of the European Union or a decision taken by the cartel authority shall be obliged to the person affected to remediate and, in case of the threat of recurrence, to refrain from the conduct. A claim for injunction already exists if an infringement is foreseeable. Affected persons are competitors or other market participants impaired by the infringement. Paragraph 3 states: > Whoever intentionally or negligently commits an infringement pursuant to paragraph 1 shall be liable for the damages arising therefrom. If a good or service is purchased at an excessive price, a damage shall not be excluded on account of the resale of the good or service. The assessment of the size of the damage pursuant to section 287 of the Code of Civil Procedure may take into account, in particular, the proportion of the profit which the undertaking has derived from the infringement. From the occurrence of the damage, the undertaking shall pay interest on its obligations to pay money pursuant to sentence 1. Sections 288 and 289 sentence 1 of the Civil Code shall apply mutatis mutandis. Paragraph 4 stipulates that, where damages are claimed for an infringement of a provision of the Act or of article 101 or article 102 of the Treaty on the Functioning of the European Union, the court shall be bound by a finding that an infringement has occurred, to the extent that such a finding was made in a final decision by the cartel authority, the Commission of the European Community or the competition authority or court acting as such in another member State of the European Community. The same applies to such findings in final judgements resulting from appeals against decisions pursuant to sentence 1. Both chambers of Parliament agreed on the eighth amendment to the Act on 5 June 2013. Industry associations will have standing to bring actions requesting that the infringer cease and desist on behalf of customers or suppliers of the defendant. The amendment also enables consumer protection associations to bring actions for injunctions or to request that the defendant pay economic benefits gained through the infringement to the Federal budget.
United States	The multiparty litigation in the United States was dramatically transformed by the 1966 amendments to Federal Rule of Civil Procedure 23, which provides the governing framework for class actions today. Rule 23 (a) sets out the four prerequisites for a class action. First, the class must be "so numerous that joinder of all members is impracticable". Second, there must be commonality, meaning there are "questions of law or fact common to the class". Third, there must be a typicality of the claims or defences of the representative parties as compared to the rest of the class. And fourth, the representative parties must "fairly and adequately protect the interests of the class".

Country, group or region	
	Rule 23 (b) provides that common issues must predominate over individual issues and that a class action must be superior to other methods of adjudication of the matter. Rule 23 (c) sets out the class certification process. The court must hold a hearing to determine whether to certify the lawsuit as a class action and an order certifying a class action must define the class and the class claims, issues or defences, and must appoint class counsel. Rule 23 (e) provides that the court must approve any settlement or other disposition of the matter and direct notice in a reasonable manner to class members. The court, however, must hold a hearing to determine whether the disposition is fair, reasonable and adequate. Class members may object to proposed dispositions that require court approval. Rule 23 (f) provides that a court of appeals, in its discretion, may permit the appeal of the decision granting or denying class certification. If a class is certified, the court typically must direct to class members the best notice practicable under the circumstances, which must concisely and clearly state in plain, easily understood language the following information: nature of the action; definition of the class certified; claims, issues or defences; ability to opt out and method of opting out of the class; and binding effect of a class judgement on members. Rule 23 (g) states that, unless a statute provides otherwise, a court that certifies a class must appoint class counsel, who must fairly and adequately represent the interests of the entire class. In appointing class counsel, the court must consider the work counsel has done in identifying claims in the action, counsel's experience with class actions, other complex litigation and the types of claims asserted in the action, counsel's knowledge of the applicable law and the resources counsel will commit to representing the class. Rule 23 (h) permits the court to award reasonable attorney's fees to class counsel in a lawsuit certified as a class action. A claim for such an award must be made by motion to the court. A class member may object to a motion for attorney's fees and the court may, in its discretion, hold a hearing to address such a motion.